No. 12,261

IN THE

United States Court of Appeals

For the Ninth Circuit

COMPANIA ENGRAW COMERCIAL E. INDUSTRIAL S. A. (a corporation),
Plaintiff and Appellant,

vs.

SCHENLEY DISTILLERS CORPORATION (a corporation),
Defendant and Appellee,

and

SCHENLEY DISTILLERS CORPORATION (a corporation),
Defendant and Appellant,

vs.

COMPANIA ENGRAW COMERCIAL E. INDUSTRIAL S. A. (a corporation),
Plaintiff and Appellee.

OPENING BRIEF OF APPELLANT, SCHENLEY DISTILLERS CORPORATION.

BRONSON, BRONSON & MCKINNON,
EDGAR H. ROWE,
Mills Tower, San Francisco 4, California,
Attorneys for Defendant and Appellant, Schenley Distillers Corporation.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

Texts

No. 12,261

IN THE

United States Court of Appeals

For the Ninth Circuit

COMPANIA ENGRAW COMERCIAL E. INDUSTRIAL S. A. (a corporation),
Plaintiff and Appellant,

vs.

SCHENLEY DISTILLERS CORPORATION (a corporation),
Defendant and Appellee,

and

SCHENLEY DISTILLERS CORPORATION (a corporation),
Defendant and Appellant,

vs.

COMPANIA ENGRAW COMERCIAL E. INDUSTRIAL S. A. (a corporation),
Plaintiff and Appellee.

OPENING BRIEF OF APPELLANT, SCHENLEY DISTILLERS CORPORATION.

This is an action for breach of contract. A judgment was rendered in favor of plaintiff and both parties have appealed.

I.

STATEMENT OF THE PLEADINGS AND FEDERAL JURISDICTION.

On January 9, 1947, plaintiff[1] filed its complaint in this action, alleging the existence and breach by defendant of a written contract wherein defendant agreed to purchase from plaintiff 1135 tons of Argentine glucose for a purchase price of $532,440.82, and that such breach damaged plaintiff in the amount of its alleged loss of profits, namely $34,685.72.[2] Defendant's motions to dismiss, and to make more definite and certain[3] were both denied.[4]

On August 4, 1947, plaintiff filed an amended complaint alleging the existence and breach of the same written contract, but claimed damages in the amount of $247,034.55.[5] Defendant's motions to dismiss, and to make more definite and certain and to strike the amended complaint[6] were denied.[7]

The answer to the amended complaint denied the existence of any contract, denied any liability to plaintiff, and challenged plaintiff's capacity to sue. The answer pleaded, as affirmative defenses, that the action was barred by the Statute of Frauds, and

---

[1]Because there are cross-appeals involved, and to avoid confusion, the parties will be designated in this brief as plaintiff and defendant, respectively, rather than as appellant and appellee.

[2]Tr., pp. 2-9. All transcript references will be to pages of the printed record.

[3]Tr., pp. 9-12.

[4]Tr., pp. 17-18.

[5]Tr., pp. 18-28.

[6]Tr., pp. 29-35

[7]Tr., p. 44.

that plaintiff was unable to perform its obligations under the contract alleged.[8]

On September 10, 1948, after a trial on the merits was had, but before judgment, plaintiff filed an "Amendment to Amended Complaint," in which it pleaded an oral contract "evidenced" by four letters, and embodied in a separate memorandum in writing, which was pleaded by attaching a copy as an exhibit.[9] The order permitting this amendment provided that the additional allegations were to be deemed denied by defendant.[10]

Jurisdiction of the District Court was based upon diversity of citizenship and the fact that the amount in controversy exceeded, exclusive of interest and costs, the sum of $3,000.00. (28 U.S.C.A. 41.)[11] This Honorable Court has jurisdiction of this appeal by virtue of the provisions of 28 U.S.C.A. 1291.

II.

STATEMENT OF THE CASE.

A. Preliminary statement.

This action arose out of negotiations for the purchase by defendant of glucose manufactured in Argentina. During the course of the negotiations numerous letters were exchanged between defendant and Harold A. Whipple, a Los Angeles import-export

---

[8]Tr., pp. 45-52.
[9]Tr., pp. 54-56.
[10]Tr., p. 57.
[11]Jurisdictional facts are pleaded at Tr., p. 18 and p. 45.

broker, who plaintiff claims was acting in this transaction as its agent. Plaintiff pleaded that during these negotiations a contract was created which "was evidenced by four letters in writing * * *; that a memorandum in writing of said contract was signed by defendant," a copy of which memorandum was attached to the amendment as Exhibit "A."[12] The trial court found that a contract was created, and rendered judgment in favor of plaintiff.

On appeal, defendant contends that, as a matter of law:

(1) The evidence fails to show the existence of any contract because

(a) there was at no time an offer and acceptance of given terms, and therefore no meeting of the minds with respect to material terms of the alleged contract;

(b) a contract was to be created only by formal purchase order; and

(c) there was no unequivocal acceptance by defendant of any offer made by plaintiff.

2. The evidence shows that Mr. Whipple was not the agent of plaintiff, but was in fact acting as a principal and for his own account, and was without authority to act for or bind plaintiff.

3. The evidence shows that plaintiff could not have performed any contract made by it with defendant, and is unable, therefore, to support any action upon it.

---

[12]Tr., p. 55.

We will state the facts relevant to the foregoing questions.

B. The facts.

J. B. Donnelly and R. H. Baglin are the agents and employees of defendant. Harold A. Whipple is a self-employed, independent export-import broker doing business in Los Angeles, California.[13] Fred G. Berger is president of plaintiff.[14]

During the fifteen days from May 20, 1946, to June 6, 1946, Whipple negotiated with defendant through Donnelly and Baglin for purchase of Argentine glucose, and letters were exchanged during such negotiations. The complaint and the amended complaint each allege that one of these letters constituted the contract, namely, a letter dated May 23, 1946, from Donnelly to Whipple.[15] The amendment to the amended complaint alleged that the contract was made "between the 19th day of May, 1946, and the 25th day of May, 1946;"[16] that the contract was "evidenced" by four letters; and that the letter above referred to dated May 23, 1946, constituted a "memorandum in writing of such contract."[17] Many other documents and letters were introduced by plaintiff, but it was admitted that they are not relevant to the issue of whether a contract was created.[18] These four letters will be set forth in their

---

[13]Tr., p. 105.
[14]Tr., p. 218.
[15]Tr., p. 4 and pp. 20-21.
[16]Tr., p. 54.
[17]Tr., pp. 54 and 55.
[18]Tr., p. 282.

proper order in the statement of facts and each will be identified as one of the four letters relied upon.

Under date of May 20, 1946, defendant through R. H. Baglin wrote Whipple the following letter,[19] which is the *first* of the four letters relied upon by plaintiff, and which confirmed a telephone conversation between them:[20]

"Dear Mr. Whipple:

This will confirm our telephone conversation of today on the subject of Argentine glucose.

We are interested in purchasing up to 1,000 tons. Shipments to commence May-1946 (if possible at this date)—50 tons; June through September—100 tons a month; October and November—275 tons a month. If your other prospective buyer exercises his option to purchase 300 tons it is understood 50 tons a month from the above will be directed to him, making a shipping schedule to us—June through September—50 tons a month; October and November—225 tons a month, December—300 tons. Further, if your prospective buyer does not take the 300 tons, we would like the opportunity to purchase this quantity in addition to the 1,000 tons.

It is understood that we will be purchasing by letter of credit direct from the Argentine shipper, cost to us not to exceed 22.3 cents a pound in wood barrels laid down, tax paid, Pacific Coast port. It is further understood the glucose is crystal-clear obtained by incomplete hydrolysis of cornstarch, 43 to 45 Baume, with a balling of 81.8 upwards.

---

[19]Tr., pp. 112-114; Plaintiff's Exhibit 2.
[20]Tr., p. 110.

> Just as soon as you receive a reply to your cable to the shipper, which we understand will be by Wednesday of this week, you will phone this office and advise us that the shipping schedule reflected above can be met.
>
> We will be expecting information from you which will enable us to issue our purchase order and covering letter of credit. Thank you very kindly for the consideration you have given this matter."

Upon the basis of this conversation and letter, Whipple, on May 20, 1946, cabled plaintiff:[21]

> "Confirming sale 1300 tons glucose accordance offer April 24 May 9 cable earliest shipping San Francisco whose name credit can you increase earlier shipments."

(The "offers" referred to in this cable are offers made to Whipple by plaintiff, before any contact between Whipple and defendant.)[22]

Upon receipt of this cable, defendant "gathered" from the cable that Whipple had sold 1300 tons of glucose, but it did not know to whom.[23]

Plaintiff immediately, on May 20, 1946, replied to Whipple by cable:[24]

> "You cannot delay twelve days and expect same price market fluctuating seriously immediate answer required if interested at onetwentyeight also

---

[21]Tr., p. 157, Deft's. Exh. A.
[22]Tr., p. 194.
[23]Tr., p. 359.
[24]Tr., p. 208; Pltf's. Exh. 20.

need answer ourlet ninth recontract for nineteen-forty-seven."

However, on May 21, 1946, Engraw cabled Whipple:[25]

"*Subject prior sale*[26] sixhundred tons available price *onethirty* require twentyfivepercent down-payment balance confirmed credit our order delivery hundredfifty tons monthly starting July answer today will endeavor secure balance if you confirm new price."

Whipple, on May 21, 1946, telephoned to defendant, and confirmed his conversation by his letter to defendant of May 21, 1946, which is the *second* of the four letters relied upon by plaintiff:[27]

"Dear Mr. Baglin:

Confirming our telephone conversation of today regarding Argentine Glucose, we quote from cable received today from our principals in Buenos Aires as follows:

'six hundred tons available price *1.375* (pesos per kilo) require twenty-five per cent down payment balance confirmed credit our order delivery hundred fifty tons monthly starting July answer today will endeavor secure balance if you confirm'

/s/ Engraw.

after our phone conversation we have replied as follows:

---

[25]Tr., p. 160; Deft's. Exh. B.

[26]Emphasis here and elsewhere, unless otherwise noted, has been added.

[27]Tr., pp. 115-118; Pltf's. Exh. 3.

'accept 600 tons *one thirty seven one half*[28] shipments one hundred fifty monthly will accept balance as available same price Schenley Distillers will open credit entire amount but no cash deposit try ship during June cable confirmation'

/s/ Whipl.

We will advise you immediately we receive their reply.

As we stated we do not feel that they are justified in asking for a cash deposit as advance payment on a deal of this sort and would have so cabled them even before discussing it with you. We do not think that this will 'gum up' the deal and have every expectation that they will confirm promptly and—we hope will be able to complete the 1300 tons for delivery in the last ¼ of the year.

to confirm the figures which we gave you:

'The export exchange rate on Argentine pesos is US$100.00—335.82 pesos or US$0.29778 per peso at pesos 1.375 per kilogram—US$0.4094-575 per kg.—$0.18573 per lb. (1 kg—2.2046 lb)

freight rate is $25 per 40 cu ft. the barrels contain slightly less than 15 cu ft with a net content of 660 lbs. approximately. This will give an equivalent of approximately $0.0142 per lb. Insurance 1.½% .30c per 100 lbs. .0030. Duty at 2c per lb. .02, giving a landed cost est. 22.293 per lb. The letter of credit should be opened in favor of Cia. Engraw Commercial & Industrial S.A. San Martin 329 Buenos Aires,

---

[28]Whipple's cable actually accepted at 1.30 pesos, not 1.375. Tr., p. 161; Deft's. Exh. C.

through the First National Bank of Boston
Buenos Aires

by cable covering the full amount in pesos at 1.357 pesos per kilo net FOB Steamer Buenos Aires expiration Oct. 30th 1946 or as confirmed.

We trust that the foregoing is clear to you and that you can arrange your credit to Cia Engraw as soon as we advise you that we have their final confirmation of the sale.

Confirming our earlier conversation on this subject Cia Engraw has indicated that they will be in a position after Jan. 1st to furnish from 300 to 500 tons monthly at the then prevailing market for glucose and we would appreciate your informing us if you would care to book this production for 1947?

As to quality this glucose is pure corn syrup, crystal clear, testing 43 to 45 Baume. We anticipate receiving a small sample by air express in a few days and will forward it on to you when received. Further we suggest that documents to accompany drafts under letter of credit should include a certificate of analysis as well as a certificate of inspection of the cooperage at time of loading, for insurance purposes.

Thank you for your cordial cooperation in this matter and assuring you of our endeavors that this deal shall work out satisfactorily for all concerned, we beg to remain

Yours very truly,
Harold A. Whipple Co.
By /s/ Harold A. Whipple."

In this last letter Whipple misquoted to defendant the contents of the last two cables by eliminating from plaintiff's cable to him the words "subject prior sale", and by changing the price in both cables from 1.30 pesos to 1.375 pesos.

Under date of May 23, 1946, defendant prepared, but did not then mail, a letter to Whipple, also relating to the conversation of May 21, which stated:[29]

> "This will confirm our telephone conversation and your letter of May 21st.
>
> We hereby acknowledge the offer of Cia. Engraw Commercial & Industrial S.A., of 600 tons of glucose made from pure corn syrup, crystal clear, and testing between 43 and 45 Baume, at a price of 1.375 pesos per kilogram. The price listed is f.o.b. steamer, Buenos Aires, packaged in wood cooperage containing approximately 660 pounds each. Shipment is to be made via McCormick Steamship Co. to San Francisco or Los Angeles.
>
> A purchase order will be sent to Cia. Engraw Commercial & Industrial S.A. as soon as possible covering this purchase, and a letter of credit will be set up to cover the full amount in pesos. Expiration date will be October 30, 1948, or as confirmed. Shipment of this material is to be at a rate of 150 tons a month.
>
> All correspondence will be handled via airmail instead of regular mail, in order to speed this matter."

(Before this letter was mailed, Whipple again telephoned defendant concerning further cables received

---

[29]Tr., pp. 123-124; Pltf's. Exh. 5.

by him from plaintiff, and the letter was not mailed until a postscript was added as will later herein appear.)

Whipple cabled plaintiff on May 21, 1946:[30]

> "Accept 600 tons *one thirty* shipments one hundred fifty monthly will accept balance as available same price Schenley Distillers will open credit entire amount but no cash deposit try ship during June cable confirmation."

Upon receipt of this cable, plaintiff learned for the first time the identity of the firm with which Whipple was negotiating. Mr. Berger, president of plaintiff, testified with respect to this wire:[31]

> "Q. So we understand the contents of it, I will read it: 'Accept 600 Tons One Thirty,' that is price, is it not?
>
> A. That is right.
>
> Q. (Reading): 'Shipments One Hundred Fifty Monthly Will Accept Balance as Available Same Price Schenley Distillers Will Open Credit Entire Amount but No Cash Deposit Try Ship During June Cable Confirmation.'
>
> Now, that is the first time that Mr. Whipple disclosed the name of the party with whom he was conducting this transaction?
>
> A. That is correct.
>
> Q. And it was following that, that you waived or withdrew the cash requirement and agreed to accept a letter of credit?
>
> A. No, we did not withdraw. On receipt of that cable disclosing Schenley Distillers as the purchaser, we went—or I went, in this instance,

[30] Tr., p. 161; Deft's. Exh. C.
[31] Tr., pp. 362-364.

to the supplier S.A.F.I.R., who was the one requesting the 25 per cent down payment, advising them who the purchaser was and they on the strength of the credit standing of the purchaser withdrew the requirement on the 25 per cent down payment.

Q. Yes. Now, did you know on the 21st of May when you received this cable from Mr. Whipple—rather, on the 22nd of May, I see that is the date, whether he had a contract for the purchase of that or not, by Schenley?

A. Did we know whether he had a *private* contract?

Q. Yes.

A. One would assume that from that telegram.

Q. What telegram are you referring to?

A. That (indicating).

Q. The one I hold. You took the same reliance upon his statement as you did of the first cable I read to you referring to 1300 tons?

A. No. You assumed, in questioning me with regard to the first cable on 1300 pounds and suggested that I made the purchases on that and my answer was that I had not made. Following the cable on the 600 tons, *he* come back answering that and *saying that he will accept* any balance up to 1300 tons and on the basis of that telegram we were ready to act.

Q. You did not know anything other than this wire states, at the time you received this wire, as to the terms of the sale, if any sale had been made by Mr. Whipple to Schenley, that is all you knew about it?

A. *That was the only information I had* that Schenley was the purchaser. That is correct."

Plaintiff, at 2:59 a.m. of May 23, cabled Whipple:[32]

"Acting on your cable twentyfirst have completed firm purchases for account Schenley Distillers elevenhundredthirtyfive tons stop Your use night letter lost July August deliveries offered are working on this stop Have closed June delivery fifty tons July sixty August Sept two hundred September onehundredfifty October twoseventyfive November twohundred December twohundred stop As contract is in Argentine pesos assume purchase is covering forward exchange more details tomorrow."

Later, on the same day, plaintiff cabled Whipple:[33]

"Elevenhundredthirtyfive tons total available at one thirty stop Now signing contracts stop Must have confirmed credit ourtel today by Saturday *otherwise sixhundred contract voided* stop Also advise credit for balance immediately stop additional fourhundred tons available subject prior sale at onethirtyfive."

The "firm purchases" allegedly made by plaintiff and referred to in its cable, Exhibit 7, above quoted, were made in reliance upon Whipple's cable of May 21st to the effect that 600 tons were accepted and he would "accept balance as available" which in turn has reference to Whipple's cable of May 20th, in which he purported to accept 1300 tons.[34] At this point plaintiff believed and understood that Whipple was confirming a sale for 1300 tons.[35]

---

[32]Tr., p. 130; Pltf's. Exh. 7.
[33]Tr., p. 163; Deft's. Exh. E.
[34]Tr., p. 363.
[35]Tr., p. 365.

These last two quoted cables interrupted the negotiations between Whipple and defendant with respect to the 600 tons and Whipple wrote the following letter under date of May 23, 1946 which is the *third* of of the letters relied upon by plaintiff as follows:[36]

> "Confirming our telephone conversation of this morning we quote the cablegrams received from Engraw in Buenos Aires as follows:
>
> Acting on your cable twentyfirst have completed firm purchases for account Schenley Distillers elevenhundredthirtyfivetons stop your use night letter lost julyaugustdeliveries offered are working on this stop have closed June delivery fifty tons July sixty Augustsept Twohundred September onehundredfifty October twoseventyfive November twohundred December twohundred stop as contract is in Argentine pesos assume purchaser is covering forward exchange more details tomorrow"
>
> /s/ Engraw
>
> "LC Whipl 5-23
>
> Urgent arrange immediately credit our order to cover sixhundred tons stop americanbank cable First Boston here so can meet requirement one supply source market today up five cents"
>
> /s/ Engraw
>
> "You will understand that they confirm actual purchase for your account of 1135 *metric* tons of glucose in accordance with shipping schedule given. That they have committed their personal credit to the suppliers pending receipt of your letter of credit and that they require your credit urgently at the earliest possible moment to sat-

[36]Tr., pp. 121-122; Pltf's. Exh. 4.

isfy one of their sources of supply who demanded a 25% deposit to hold the lot for you.

Will you please ask your New York office to cable the credit as quickly as possible instead of airmailing same? This is particularly important as the next boat starts loading about the 29th and will sail on June 9.

Your credit should call for a total of 1145 Metric tons approx. before December 31st, allowing partial shipments, *and your purchase order should show* the shipping schedule given 'or more.' We have cabled them again tonight asking them to try to improve the June July deliveries.

We await your confirming letter which you stated is in the mail today. Thank you for your cooperation.

Yours sincerely,
Harold A. Whipple Co.
/s/ Harold A. Whipple"

Defendant confirmed the same telephone conversation by adding to its letter of May 23 above quoted the following postscript and mailing the whole letter to Whipple:[37]

"P.S. Since dictating the above, we wish to acknowledge and accept the offer of Cia. Engraw Comercial & Industrial S.A., of 1135 tons with a shipping schedule as follows: June—50 tons; July—60; Aug.-Sept.—200; September—150; October—275; November—200; December—200. *The conditions of acceptance of this quantity are the same as those outlined for the 600 tons.* The

[37]Tr., pp. 124-125; Pltf's. Exh. 5 (p.s.).

offer of 600 tons is considered superseded by the foregoing."

This last letter is the *fourth* of the letters relied upon by plaintiff and it is the letter pleaded as being either the contract or a memorandum of the contract. Whipple did not advise plaintiff of the conditions contained in the last (fourth) letter until *after* negotiations had terminated.[38]

On May 23, 1946, Whipple also wrote plaintiff:[39]

"We therefore confirm the sale of 1135 tons (metric) of glucose 43-45 baume, crystal clear, derived from incomplete hydrolysis cornstarch with a Balling of 81.8 upwards. We have in our possession a confirming letter from Schenley authorizing us to secure up to 1300 tons for them in accordance with your earlier offer. And we have their verbal commitment and assurance that confirming letter is in the mail tonight covering the actual confirmation of the above.

They state that the actual letter of credit and purchase order will be cleared directly to you from their Louisville and New York offices via airmail (we will ask them to cable credit) just as soon as it can be issued.

We have sold this glucose to them at Pesos 1.375 per kg FOB Buenos Aires to include our overage of .075 pesos per kg. which we have asked you to confirm tonight with the understanding that payment will be remitted from the collecting bank here. We hope that you will be able to

[38]Tr., pp. 191-2.
[39]Tr., p. 166; Deft's. Exh. F.

improve the shipping schedule for June July as they are most anxious to get larger deliveries as soon as possible.

H. W. Co."

On May 28th, 1946, five days after the contract here in suit is alleged by plaintiff to have been made, plaintiff cabled Whipple that it could supply Whipple with additional 200 and possibly 400 tons of glucose. Whipple replied to plaintiff on the same day:[40]

"Accept two hundred four hundred tons offered requires one week clear credit confirm stop *Subject successful conclusion present negotiations* Schenley prepared negotiate 1947 production fixed priced basis stop Can arrange two weeks extension trucks if you advise confidence successful conclusion."

On June 6, 1946, defendant terminated negotiations.

The following matters, while collateral to the question of the creation of a contract, are relevant to other issues.

At the time of this transaction Whipple had never made or completed any transactions with plaintiff.[41]

On May 23 Whipple cabled plaintiff:[42]

"Schenley credit includes our overage you instruct collecting bank remit us from proceeds please cable confirmation this arrangement what results trucks."

---

[40]Tr., p. 134; Pltf's. Exh. 9.
[41]Tr., p. 365.
[42]Tr., pp. 167, 168; Deft's. Exh. G.

Plaintiff responded to Whipple by letter dated June 3, 1946, stating in part:[43]

> "Then, I think we should also have an understanding as between yourselves and ourselves with regard to the commissions or overcharges involved. Actually on this particular contract, for the balance of 1946, we have had to make our purchases F.A.S. and after paying the necessary charges, including custom brokers, etc. we will net about 0.5 centavos per kilo but with that, we also have the risk of having to pick up deliveries of glucose if the coordination and the arrival of a steamer should not coincide and this may well cut into our profit margin if we should have any bad luck from a steamer point of view.
>
> I don't know what costs you have on your 7½ centavos per kilo but I believe that we should coordinate our efforts first, in order that there may be a proper division of the commissions or overages available and second, that we may know, in determining the price we can afford to pay, and also in determining the price at which the glucose should be offered.
>
> We certainly want to be fair to you but we believe you also desire to be fair to us and if we are to arrange a program of this sort to carry on in the future, regardless of the price of glucose, it should be with a complete understanding of the manner in which your and our interests will be compensated.
>
> Then too, there is another factor which disturbs me somewhat for I am sure you realize the danger on basing this program entirely on only one

[43]Tr., pp. 203-207.

customer. In an earlier letter, you mentioned your interest in establishing yourselves as sellers of glucose in many areas of the United States and if we are both 'on the job' you can develop the market and we the sources and establish a continuing business with profit to both of us. But I cannot help but feel that your interest and ours, would be much better served if we not only close a contract with Schenley for the present but that you also develop your other markets using perhaps the other alternative, i.e., a sliding scale alternative until you have your market so developed that with firm contracts we can also cover them for a whole year or a large portion of the year at firm prices.

I shall be most interested to hear from you at an early date with regard to this, but particularly would be interested in word from you as to the development of a more diversified group of customers on whom we both can depend for continuing business as you establish your market and we establish our sources.

. . . . .

I cannot help but regret that you did not accept our earlier suggestion on glucose which was along similar lines i.e., that you give us a range and quantities desired and let us take the steps necessary to cover.

Such a condition makes it definitely imperative that we arrange our respective programs with 'all the cards on the table' so that we will both know the manner in which we must deal with the entire program in order that both our organizations may deal with continuing success.

> With kindest regards and looking forward to hear from you at a very early date, I am

The issue of plaintiff's ability or inability to have performed the alleged contract, assuming its existence, revolved around the scope of certain written and verbal limitations of the Argentine Government on the exportation of glucose from Argentina. In order to perform any such contract plaintiff would have had to secure an export permit from the Argentine Government.[44] Permits were not issued for part of the period covered by the alleged contract by reason of the written and verbal orders above mentioned. The question involves the scope of such written and verbal orders.

Mr. Berger testified that he applied for a permit for 935 tons on May 27;[45] and that earlier in July he made two further applications, one for 200 tons and one for 400 tons.[46] Although he did not testify specifically as to the existence or absence of any government restrictions upon exports he did say that he could have obtained the permits at any time upon payment of certain taxes levied upon the issuance of such permits.

However, under date of September 30, 1946, plaintiff sent one of its suppliers of glucose a telegram which in part reads as follows (Translated from Spanish):

---

[44]Tr., p. 232, et seq.
[45]Tr., p. 239.
[46]Tr., p. 240.

"Conversation confirmed regarding glucose contracted with you exportation permits were not granted since May last owing to disposition of the Superior Government of the Nation preventing us from fulfilling sales in North America during four months now our clients have left their purchases without effect * * *" (See original Deft's. Exhibit in appeal file.)

Drs. H. B. Verella and A. Padilla, Argentine attorney witnesses for plaintiff, testified that there was no prohibition against the export of glucose during the period involved but that by written resolution the secretary of Industry and Commerce of the Argentine Government limited the export quota of glucose for the period of July 1st to December 1, 1946, to a total of 400 tons; that this regulation was in force until September 18, 1946, when a second resolution was passed "According to which export of glucose will remain submitted to previous permits which will be granted as soon as domestic requirements are covered."[47]

The plaintiff's witness Juan Lang testified that on May 28, 1946, he applied for permits to issue glucose and that the permits were granted on June 11th. He also testified that on June 16, 1946, Argentina proclaimed a campaign of 60 days to reduce the cost of living and that as a result "the export of all Argentine raw materials were prohibited for these 60 days. In connection with this, the export of glucose, too was prohibited—let me say, not the export—can I

[47]Tr., p. 767; see also pp. 756-757 and 765-768.

correct? The issuing of new export licenses for glucose was prohibited."[48] Lang also indicated that further orders were made in August or September[49].

Defendant's witness Dr. M. Robiola, an Argentine attorney, testified that there was a verbal order prohibiting exportation of glucose from May 1, 1946, to August 9, 1946, which verbal order was followed by written resolutions dated August 29th and September 18, 1946.[50]

Dr. M. Caranza, also an Argentine attorney witness for defendant, testified that by verbal order made the first part of May, 1946, the secretary of Industry and Commerce prohibited the issuance of permits for the export of glucose and to withhold permits already granted but not handed over to the exporters. Caranza also testified to the existence of the written resolutions passed in August and September.[51] Caranza's testimony is confirmed by defendant's witness Dr. A. C. Magdalena.[52]

III.

SPECIFICATION OF ERRORS.

Defendant contends that the trial Court erred in

1. Finding, as it did in finding no. 6, that a contract was created between the parties, and in find-

---

[48]Tr., p. 967.
[49]Tr., p. 990.
[50]Tr., p. 897.
[51]Tr., pp. 910-911.
[52]Tr., pp. 930-931.

ing that defendant and plaintiff agreed to the terms of such contract as set out in that finding, and erred in making all later findings based upon the existence of such a contract.

2. Finding, as it did in findings nos. 5 and 12 that plaintiff was ready, willing and able to perform the alleged contract.

3. Failing to find upon the issue as to whether Whipple was or was not the agent of plaintiff.

IV.

ARGUMENT.

A. NO CONTRACT WAS CREATED BETWEEN THE PARTIES.

1. Preliminary statement.

On the question of whether a contract was created, there is no conflict in the evidence. All of the material evidence is in writing, as, indeed, it must be in order to avoid the bar of the statute of frauds. It has been and is the position of defendant that as a matter of law no contract was created between the parties. There were negotiations between the parties, but these negotiations never culminated in an agreement or a meeting of the minds.

Early in the negotiations, Mr. Whipple, the broker, in his desire to complete a sale which would result in very substantial profit to him, misstated facts to and misled plaintiff as to the state of his negotiations with defendant. Plaintiff appeared hesitant to enter

into any sale with Mr. Whipple up to the time that plaintiff learned the identity of the firm with which Whipple was dealing. Thereupon plaintiff made commitments with its own suppliers which would put it into a position to carry out any agreement which might be made between the parties. The evidence clearly shows, we submit, that both Mr. Whipple and plaintiff, in their enthusiasm to make a very substantial sale, acted in a manner unjustified by the facts and, that this suit as an attempt to obtain relief from the consequences of their own imprudent and premature actions.

We will show:

(1) That there was no meeting of the minds between the parties on the terms of any given contract, and none as to the contract alleged;

(2) That the parties intended and understood that any agreement which might be made between them would be made by formal purchase order, accompanied by a letter of credit; and

(3) That assuming, for argument's sake only, a meeting of the minds as to the terms of the proposed agreement, defendant at no time unequivocally accepted such terms.

We will discuss these points, which are independent and not cumulative, in the order set forth.

2. The minds of the parties never met with respect to any given agreement.

There is no question but that a contract can be created by a series of letters. To accomplish this there

must be an offer; that particular offer must be accepted unequivocally; the offer and acceptance must be such that, at a given point, the minds of the parties meet with respect to material terms of the contract. However, a person cannot impose a contract upon a correspondent by selecting several isolated letters and putting them together without regard to the fundamental doctrines relating to the creation of a contract as plaintiff here attempts to do.

The first letter involved was that written under date of May 20, 1946, by defendant to Whipple[53] which stated in part that:

> "We are *interested* in purchasing up to one thousand tons * * * further, if your prospective buyer does not take the 300 tons, we would like the *opportunity* to purchase this quantity in addition to the 1,000 tons.
>
> It is understood that we will be purchasing by letter of credit direct from the Argentine Shipper, * * *
>
> We will be expecting information from you which will enable us to issue our purchase order and covering letter of credit. * * *"

This letter is certainly not an offer. It is an expression of interest and an invitation to open negotiations.

On the basis of this expression of "interest", Whipple on May 20 cabled plaintiff.[54]

> "Confirming sale 1300 tons glucose * * *"

---

[53]Quoted in full on pages 6-7 above.
[54]Quoted in full at page 7 above.

At this point, of course, Whipple had made no sale to defendant. There was no sale at all unless there was one from plaintiff to Whipple. This is the first attempt by Whipple to distort an existing "interest" into a binding commitment.

However, plaintiff replied to Whipple's cable on the same day, May 20, 1946, and rejected the sale or offer to purchase—whichever Whipple's cable constitutes—saying:[55]

> "You cannot delay 12 days and expect the same price * * *"

Plaintiff did not act on Whipple's cable.[56] On the next day, however, plaintiff cabled Whipple that "subject to prior sale" it could supply 600 tons at 1.30.[57] Whipple immediately communicated with defendant and, while purporting to quote the cable, changed it in the following respects:

1. He eliminated the words "subject to prior sale".

2. He raised the quoted price from 1.30 pesos to 1.375.[58]

The legal effect of the first change was to convert plaintiff's cable from an invitation to make an offer to a firm offer. The substance of the conversation of May 21, 1946, between Whipple and defendants with respect to this cable is confirmed in the *body* of the letter dated May 23rd written to Whipple by defendant,[59]

---

[55]Quoted in full at page 7 above.
[56]Tr., p. 363.
[57]Quoted in full at page 8 above.
[58]See Pltf's. Exh. 3, quoted above on pp. 8-10.
[59]See Pltf's. Exh. 5, quoted above on p. 11.

which contains an acknowledgment of the offer of 600 tons and adds a number of conditions with respect to cooperage, steamship line, purchase order, letter of credit.

This letter would not have been an acceptance of the alleged offer for two reasons: it contains no words of acceptance and secondly, it contained new conditions which under any view would make it at most a counter-offer. Whipple, however, on the same day (May 21, 1946), cabled plaintiff:[60]

> "*Accept* 600 tons 130 shipments 150 monthly *will accept balance as available* same price Schenley Distillers will open credit entire amount but no cash deposit price shipped during June cable confirmation."

Whipple did not advise plaintiff of the conditions expressed in the telephone conversation and confirmed in defendant's letter. His "acceptance" of any "balance" over 600 tons was purely gratuitous and has no foundation in the conversation with defendant. Finally, the statement "no cash deposit" is a definite variation of the terms of the alleged offer. This was obvious to Whipple for he added the words "cable confirmation".

Again at this point the most we have under any circumstances is a counter-offer from *Whipple* (not defendant) to plaintiff. The last quoted cable represents a second attempt by Whipple to conclude a contract when he knew no agreement had been reached.

---

[60]Tr., p. 161; Deft's. Exh. C.

Further, the proposed contract that he cabled about was one still concerning a contemplated 1300 tons. All that defendant acknowledged was an offer of 600 tons.

The last quoted cable is significant also in that for the first time plaintiff is told the identity of the firm with which Whipple is negotiating. It is evident that the reason for this disclosure was to obviate the necessity of a cash deposit.[61] The testimony and wording of the cable makes this clear.

Whipple's effort to stimulate the creation of the contract for the 600 tons was interrupted at this point by another cable from plaintiff, which apparently concurred in Whipple's reliance upon defendant's responsibility, for the cable stated:[62]

> "Acting on your cable 21st *have completed firm purchases* for account Schenley Distillers *1135 tons* * * *"

At this point it is difficult to see what plaintiff was relying upon even if we were to assume that Whipple was plaintiff's agent. If the latter is the case plaintiff must be held to know that not only was defendant's communication a mere "acknowledgment" of the offer of 600 tons, but if it were to be construed as an acceptance, it went to only 600 tons. Under no circumstances could defendant possibly be bound to accept any "balance as available". The only basis upon which plaintiff could have acted in making the

---

[61]Tr., p. 362.

[62]Quoted in full on page 14 above.

commitments for the 1135 tons was by using all of the various offers and counter-offers, proposals and counter-proposals without regard to the state of negotiation when each was written and without regard to the rejections of them. To exemplify this, plaintiff's commitment was expressly made in reliance upon Whipple's cable of May 21st to the effect that 600 tons were accepted and "will accept balance as available" which in turn has reference to Whipple's cable of May 20, which purported to accept 1300 tons on the basis of defendant's expression of "interest". Plaintiff acted in spite of the fact that plaintiff itself rejected the attempt by Whipple to purchase 1300 tons; the fact that defendant did not agree to purchase 1300 tons but merely expressed an interest in negotiating with respect thereto; and the fact that defendant never stated that it would accept any glucose and at this point in the negotiations its letter acknowledged only the 600 ton offer. Therefore, it cannot be denied that plaintiff in purchasing 1135 tons on May 22nd, could not have been acting for defendant, nor acting pursuant to any agreement between it and defendant. It is further to be noted that plaintiff knew nothing of the additional conditions contained in the main body of defendant's letter to Whipple dated May 23, 1946, and did not learn of them until June 6, 1946.

The situation then, on May 22nd, was that defendant and Whipple were negotiating for a purchase of 600 tons. *At the same time,* plaintiff, under the assumption that defendant was committed to purchase

"up to 1300 tons" purchased, for defendant's account, 1135 tons.

Whipple received plaintiff's cable concerning the 1135 tons before defendant mailed its letter acknowledging the 600 ton offer. Whipple, on receiving the cable, telephoned defendant, and the ensuing conversation was reduced to writing by Mr. Donnelly by adding a postscript to the letter previously written, dated May 23rd, and referring to the 600 ton offer. The whole letter to Whipple reads:[63]

"Gentlemen:

This will confirm our telephone conversation and your letter of May 21st.

We hereby acknowledge the offer of Cia. Engraw Comercial & Industrial S.A., of 600 tons of glucose made from pure corn syrup, crystal clear, and testing between 43 and 45 Baume, at a price of 1.375 pesos per kilogram. The price is f.o.b. steamer, Buenos Aires, packaged in wood cooperage containing approximately 660 pounds each. *Shipment is to be made via McCormick Steamship Co. to San Francisco or Los Angeles.*

A purchase order will be sent to Cia. Engraw Comercial & Industrial S.A. as soon as possible covering this purchase, and a letter of credit will be set up to cover the full amount in pesos. *Expiration date will be October 30, 1948, or as confirmed.* Shipment of this material is to be at a rate of 150 tons a month.

---

[63]Tr., pp. 123-124; Pltf's. Exh. 5.

All correspondence will be handled via air mail instead of regular mail, in order to speed this matter.

Very truly yours,
Schenley Distillers
Corporation
By /s/ J. B. Donnelly.

JBD:LP

P.S. Since dictating the above, we wish to acknowledge and accept the offer of Cia. Engraw Comercial & Industrial S.A., of 1135 tons with a shipping schedule as follows: June—50 tons; July—60; Aug.-Sept.—200; September—150; October—275; November—200; December—200. *The conditions of acceptance of this quantity are the same as those outlined for the 600 tons.* The offer of 600 tons is considered superseded by the foregoing."

It is this last letter which plaintiff contends is either the contract or a memorandum of the contract. Plaintiff however thought that by its cable of May 22nd it was accepting an offer which had been made in the May 21st cable from Whipple relating to *1300* tons at *1.30* pesos per kilo.[64] If Whipple was acting as principal rather than as agent, it is true that plaintiff was accepting an offer—Whipple's offer. Plaintiff now claims that its May 22nd cable was not an acceptance but an offer, and that Schenley accepted that offer by the letter last quoted. Mr. Berger testified that he believes Whipple's cable of May 21st was

[64]See memo. from Mr. Berger to Dichter (an employee of defendant) on pages 300-302 of the Transcript.

a firm offer for up to 1300 tons and that he acted upon it as such. He stated:[65]

"A. That is dated May 21st and received by us on the 22nd.

Q. That is the one—you made no purchases firm on his account until you received this cable that you have pointed out, that is Defendant's Exhibit C?

A. That is correct.

Q. So we understand the contents of it, I will read it: 'Accept 600 Tons One Thirty,' that is price, is it not?

A. That is right.

Q. (Reading): 'Shipments One Hundred Fifty Monthly Will Accept Balance as Available Same Price Schenley Distillers Will Open Credit Entire Amount but No Cash Deposit Try Ship During June Cable Confirmation.' Now, that is the first time Mr. Whipple disclosed the name of the party with whom he was conducting this transaction?

A. That is correct.

Q. And it was following that, that you waived or withdrew the cash requirement and agreed to accept a letter of credit?

A. No we did not withdraw. On receipt of that cable disclosing Schenley Distillers as the purchaser, we went—or I went, in this instance, to the supplier S.A.F.I.R., who was the one requesting the 25 per cent down payment, advising them who the purchaser was and they on the strength of the credit standing of the purchaser withdrew the requirement on the 25 per cent down payment.

---

[65]Tr., pp. 362 and 364.

Q. Yes. Now, did you know on the 21st of May when you received this cable from Mr. Whipple—rather, on the 22nd of May, I see that is the date, whether he had a contract for the purchase of that or not, by Schenley?

A. Did we know whether he had a *private* contract?

Q. Yes.

A. One would assume that from that telegram.

Q. What telegram are you referring to?

A. That (indicating).

Q. The one I hold. You took the same reliance upon his statement as you did of the first cable I read to you referring to 1300 tons?

A. No. You assumed, in questioning me with regard to the first cable on 1300 pounds and suggested that I made the purchases on that and my answer was that I had not made. Following the cable on the 600 tons, he come back answering that and saying that he will accept any balance up to 1300 tons and on the basis of that telegram we were ready to act.

Q. *You did not know anything other than this wire states, at the time you received this wire, as to the terms of the sale, if any sale had been made by Mr. Whipple to Schenley, that is all you knew about it?*

A. *That was the only information I had that Schenley was the purchaser. That is correct.*"

In addition to the above, we will show later herein that Whipple knew that negotiations actually were leading to an offer to be made by defendant in the form of a purchase order and covering letter of credit.

The complete confusion of the state of negotiations up to and including May 23, 1946, is evidenced by the fact that plaintiff was selling glucose at 1.30 pesos per kilo. Defendant, however, was given to understand that the price was to be *1.375* pesos. Plaintiff has sued on the basis of the latter price, but since it never claimed that price, its claim is arbitrary and unsupportable.

Further, while plaintiff is suing on the basis of a contract for 1135 tons, it thought that it had and was performing a contract for either 1300 or 1535 tons and it *actually purchased* 1535 tons. In other words, *the very contract* upon which plaintiff purports to sue was believed by it to be one for 1535 tons, not 1135, and at a price of 1.30 pesos, not 1.375. There is no claim whatever that defendant ever undertook to purchase 1535 tons.

There is no point in the foregoing correspondence at which the minds of plaintiff and defendant met with respect to any given contract for any given amount of glucose at any given price. There was at no time anything more than negotiation.

The evidence shows also that the parties realized that this was the case for on May 28th, five days after the contract is alleged to have been made, plaintiff cabled to Whipple that it could supply Whipple with an additional 200 and possibly 400 tons of glucose. On the same day Whipple cabled plaintiff:[66]

---

[66]Pltf's. Exh. 9.

> "Accept 200-400 tons offered required one week clear credit confirm stop *Subject successful conclusion present negotiations* Schenley prepared negotiate 1947 productions fixed price basis stop * * *"

As late as May 28, 1946, therefore, Whipple knew that no agreement had been reached and that negotiations leading to a purchase order and covering letter of credit were still in progress.

Even assuming, however, it might be said that the minds of the parties had met with respect to certain broad general outlines of an agreement, nevertheless there are a number of material elements of the alleged contract on which the minds of the parties never met.

The evidence from the exhibits shows that the letter of credit was a vital element in the negotiations.[67] The evidence also shows that there are several kinds of letters of credit,[68] and that plaintiff needed an irrevocable letter of credit.[69] In plaintiff's letter to Mr. Whipple, it is stated that no assurance is to be given Mr. Whipple with regard to his "overage" until the *particular terms* of the letter of credit were examined. There was, then, no agreement between the parties on this material item; indeed Mr. Donnelly testified without contradiction that the terms of the proposed letter of credit, other than as to price and expiration date, were never discussed.[70]

---

[67]Tr., p. 162, Deft's. Exh. D; Tr., p. 163, Deft's. Exh. E; Tr., pp. 121-122, Pltf's. Exh. 4.
[68]Tr., pp. 688-689.
[69]Tr., p. 244.
[70]Tr., p. 689.

Whipple's letter of May 23, 1946, demanded that the expiration date on the letter of credit be December 31, 1946. Donnelly's letter of May 23, 1946 (on which plaintiff places principal reliance) provides that the expiration date on the letter of credit will be "October 30, 1946, or as confirmed".

Donnelly's letter of May 23, 1946, specifically requires that shipment be made by McCormack Steamship. This is a material direction to make delivery to a particular agent. It was first mentioned in this letter and had not heretofore been discussed by any of the parties.[71] There is no evidence that Whipple agreed to this condition, and for that matter no evidence that he had any authority to agree on behalf of plaintiff. Further, the evidence shows that plaintiff knew nothing about this condition or any of the others contained in defendant's May 23rd letter until after defendant had terminated negotiations on June 6th.[72] The materiality of this condition is demonstrated by plaintiff's written expression of concern about shipping facilities even before it learned that defendant would demand one certain carrier be used.[73]

There was no discussion whatever of metric tons as such. The quantity was discussed only in tons. A metric ton is of course 2204.6 pounds, which fact is a proper subject of judicial notice.

---

[71]Tr., pp. 691-692.
[72]Tr., p. 192.
[73]Tr., p. 204; Pltf's. letter to Whipple dated June 3, 1946.

Plaintiff had no knowledge whatever of any of the "conditions" other than the condition relating to the issuance of a purchase order and letter of credit contained in Donnelly's letter of May 23rd until after negotiations had terminated.

Not only was there no meeting of minds on these points; there could not have been because plaintiff never knew of their existence. If knowledge of the conditions is to be imputed to plaintiff because it has established that Whipple was its agent, still there was no acceptance by Whipple or plaintiff of these additional conditions.

The most that could be said of defendant's May 23rd letter, which plaintiff relies upon as being the contract, is that it was a counter-offer which was never accepted.

The following authorities demonstrate that under the law, no contract can be created on the basis of the above facts.

Section 1585 of the California Civil Code provides:

> "An acceptance must be absolute and unqualified, or must include in itself an acceptance of that character which the proposer can separate from the rest, and which will include the person accepting. A qualified acceptance is a new proposal."

In *Four Oil Co. v. United Oil Producers,* 145 Cal. 623, 79 P. 275, a contract for the sale of oil was sought to be created on the basis of two letters. The letter of acceptance followed the offer in all particu-

lars, except to add that the "15° Baume" be "at a temperature of 60° fahrenheit". In concluding that no contract had been created, the Court said at page 624:

> "The rules for determining whether or not a proposal and acceptance constitute a binding contract are well settled, and by this court have been expressed in the following language: 'To constitute a binding contract made in this form [letters] there must be a proposal squarely assented to. If the acceptance be not unqualified, or go not to the actual thing proposed, then there is no binding contract. (1 Wharton on Contracts, sec. 4.) A proposal to accept, or an acceptance based upon terms varying from those offered, is a rejection of the offer. (*National Bank v. Hall,* 101 U.S. 43, 51.) An offer imposes no obligation, unless it is accepted upon the terms upon which it was made. (*Tilley v. County of Cook,* 103 U.S. 161.) An acceptance must be absolute and unqualified. A qualified acceptance is a new proposal. (Civ. Code, sec. 1585.)' (*Wristen v. Bowles,* 82 Cal. 84. See, also, *Yore v. Bankers etc. Assn.,* 88 Cal. 609.)"

In *Yore v. Bankers etc. Assn.,* 88 Cal. 609, 26 P. 514 the Court stated at page 615:

> "'An acceptance, to be good, must of course be such as to conclude an agreement or contract between the parties. And to do this it must in every respect meet and correspond with the offer, neither falling within or going beyond the terms proposed, but exactly meeting them on all points, and closing with them just as they are stated.'"

In *Williston on Contracts* (Revised Edition) page 222, there appears the following general statement of the law:

> "A conditional acceptance is in effect a statement that the offeree is willing to enter into a bargain differing in some respect from that proposed in the original offer. The conditional acceptance is, therefore, itself a counter-offer and rejects the original offer, so that thereafter even an unqualified acceptance of that offer will not form a contract.
>
> There are numerous decisions on the question whether a particular acceptance is conditional. A few of these may be given as illustrations. An acceptance 'subject to the terms of a contract being arranged' between the parties' lawyers is conditional, *and no acceptance is good which contains the condition that subsequent arrangement is to be made concerning any of the terms of the bargain.* So a reply to an offer to sell real estate accepting the offer if the title is satisfactory to the buyer's attorney is not a valid acceptance, since it seems on a proper interpretation of the reply that the offeree thereby imposes as a condition of the bargain the favorable opinion of his own lawyer as distinguished from the standard established by the law. A reply to an offer of the unexpired term of a lease that the offeree accepted subject to the lessor's assent creates no contract. So an offer to sell land is not accepted by a reply which though in terms accepting the offer at the outset, imposes the condition that certain additional deeds be turned over; or that a sum to be paid for an option should be credited on the price if the option was exercised. A reply

imposing the requirement of a bond is conditional. So a reply to an offer to sell land, directing that the deed be sent to another state where payment will be made, since such a reply imposes the condition that the place of payment shall be other than that where it would have been on a true interpretation of the offer, and an alteration of the place of payment is fatal to the existence of a contract. *A reply altering in any way the method of payment or performance,* or making new stipulations as to quality, or the title of property for sale invalidates an acceptance. These illustrations might easily be multiplied. Even the requirement of an acknowledgment has been held a fatal addition."

See also:

Howard v. Chow, 27 C.A. (2d) 755, 81 P. (2d) 994;

Ellingsworth v. Shannon, 161 Ore. 106, 88 P. (2d) 293;

12 *Am. Jur.* 545;

17 *Corp. Jur.* Sec. 378;

6 *Cal. Jur.* 61;

Roffinella v. Roffinella, 191 Cal. 753, 758, 218 P. 397;

Vanhoosen v. Briscoe, 85 Cal. App. 746 at 749, 259 P. 1115.

Actually, there was no given point in the negotiations at which a contract could have been created, for there was no point at which there was any agreement upon such basic elements as quantity and price. However, even if quantity and price had been determined

on May 23, 1946, there still could not be any contract, for the alleged letter of acceptance (defendant's letter of May 23) contained additional, material conditions, and could constitute, at most, a counter-offer which was never accepted.

3. **It was understood between the parties that a contract would be created, if at all, by a formal purchase order.**

Even if it be assumed that all of the terms of the proposed contract were decided and agreed upon, nevertheless the evidence shows without substantial conflict that no agreement was to exist until a purchase order was issued and signed by plaintiff and defendant.

In the very first letter written by defendant upon the subject of glucose[74] it is stated:

> "We will be expecting information from you which will enable us to issue our purchase order and covering letter of credit."

From the very first sign of interest by defendant, therefore, Whipple knew that defendant intended to contract, if at all, by purchase order. Indeed, even in the absence of the specific expression, it would be unduly naive of an experienced import broker to think that a purchase of this size (about $500,000) would be accomplished by a business firm such as defendant without a formal document committing the seller as well as itself to the sale, and upon definitely prescribed terms. Further, the established practice in the export

[74] Pltf's. Exh. 2, quoted above in full at pp. 6-7.

business, even from the standpoint of the foreign seller, is not to deem himself committed until he has received not only a committing document from the purchaser, but a covering letter of credit establishing payment for the goods. In that manner, both seller and buyer are protected since the shipments are made against the letter of credit and payment is made against documents of title to the goods.[75]

However, Whipple's understanding that no contract would be created except by purchase order is shown by more than inference. In his letter to defendant of May 23, 1946, relative to the 1135 tons, *Whipple* specifically states:[76]

> "Your credit should call for a total of 1145 Metric tons, * * * *and your purchase order* should show the shipping schedule given 'or more'."

Again, in Donnelly's letter of May 23, 1946, defendant's intention with regard to the necessity of a purchase order is reaffirmed in this language:[77]

> "A purchase order will be sent to Cia. Engraw Commercial & Industrial S.A. as soon as possible covering this purchase, and a letter of credit will be set up to cover the full amount in pesos."

On May 23, 1946, Whipple cabled plaintiff:[78]

> "SCHENLEY ISSUING PURCHASE ORDER CREDIT YOUR FAVOR DIRECTLY FROM NEW YORK 1135 TONS SOONEST POSSIBLE TRY IMPROVE JUNE JULY SHIPMENTS."

---

[75]Tr., pp. 635-636.
[76]Pltf's. Exh. 4, quoted above in full at pp. 15-16.
[77]Pltf's. Exh. 5, quoted above in full at p. 11.
[78]Tr., pp. 168-169; Deft's. Exh. H.

Also on May 23, 1946, *Whipple* wrote Engraw a letter, in which he states:[79]

> "They (Schenley) states that the *actual* letter of credit and *purchase order* will be cleared directly to you from their Louisville and New York offices via airmail * * *"

In addition to the above, Donnelly testified as follows with regard to the necessity of a purchase order:[80]

> "Q. At the end of that conversation you attached this postscript (referring to Donnelly's May 23, 1946 letter to Whipple) and I am calling your attention to the expression in the next to the last sentence—last two sentences, rather: 'The conditions of acceptance of this quantity are the same as those outlined for the 600 tons. The offer of 600 tons is considered superseded by the foregoing.' Was that subject discussed between you and Mr. Whipple in the May 24th conversation just preceding the writing?
>
> A. I don't understand your question. What do you mean by 'was that subject discussed?'
>
> Q. Was the question of the conditions, the condition of the issuance of a purchase order and a letter of credit——
>
> A. Oh, yes.
>
> Q. —in the manner you have described?
>
> A. When Mr. Whipple called me on the 24th * * * I told Mr. Whipple that I had written him a letter acknowledging the 600 tons, and mentioned to him about the letter of credit and the purchase order. And then he told me over the phone that he had a new offer of 1135 tons and

[79] Tr., p. 166; Deft's. Exh. F.
[80] Tr., pp. 690-692.

gave me completely new shipping dates. And I told him that I would acknowledge that offer with the same conditions as the 600 tons.

* * * * * * *

Q. This may be a repetition. Referring both to the purchase order and the letter of credit was there any discussion between you and Mr. Whipple in any of the conversations as to the contents and makeup of either document?

A. No, sir; there was not."

(and the following testimony of the same witness on cross-examination)[81]

"Q. You personally had the authority to sign that purchase order or any purchase order or that or any other amount right here on the Pacific Coast, didn't you?

A. Yes; I would say that I have the authority.

Q. So there wasn't any reason for you to have to send this thing back to Cincinnati?

A. Is that a question?

Q. That is a question.

The Court. Yes.

A. The reason was that because sugar or glucose is something that I normally do not purchase on the West Coast. I prefer always having that handled in Cincinnati, our main office; and then, secondly, the amount was pretty large and I would prefer our head purchasing organization to handle the purchase order for $600,000.

The Court. Let me inject a question. Did you inform Mr. Whipple of either or both of those reasons?

---

[81]Tr., pp. 693-701.

The Witness. A. No; I did not inform him of the reasons. No sir.

The Court. You merely told him that the purchase order would have to be issued?

The Witness. That is right.

The Court. In the East?

The Witness. That is right.

* * * * * * *

By Mr. E. B. Stanton. By that you were referring to this formal purchase order which you have identified?

A. Yes, sir.

Q. You have arranged for the purchases many times prior to this occasion without the signature of the formal purchase order, haven't you?

* * * * * * *

A. I have made arrangements, but none of them have ever been concluded until a purchase order is issued and signed, because that is a rule of our corporation.

* * * * * * *

By Mr. E. B. Stanton. You say that you never advised Mr. Whipple at any time that you would require the signature of Engraw in South America to the purchase order or any other document, did you?

A. No; I did not personally advise Mr. Whipple of that.

Q. You did not direct anyone to advise him of that fact, did you?

A. I did not direct anyone. I just told Mr. Whipple that I would get a purchase order. A purchase order automatically requires a signature, as I said before, to complete the deal.

* * * * * * *

By Mr. E. B. Stanton. Q. I call your attention now to this purchase order which is Defendant's Exhibit No. U. On the reverse of the purchase order you will note 'TERMS AND CONDITIONS'. Will you detail here and now which of those terms and conditions you discussed with Mr. Whipple over the telephone?

A. I discussed none of these terms and conditions with Mr. Whipple over the telephone.

Q. You did not tell him about any one of them?

A. Certainly not. All I told Mr. Whipple was that he would receive a purchase order, and, as I stated before, I expect him to read the fine print."

Again, on May 28, five days after the date on which plaintiff now claims a contract was made Whipple in a cable to plaintiff characterized the proceedings to that date as being "negotiations" yet to be consummated. The only inference to be drawn is that the negotiations had not yet culminated in the purchase order.

The foregoing written and oral evidence demonstrates the fact that both parties understood that no contract was to be created other than by formal purchase order, covered by a letter of credit.

The law pertinent to this fact precludes the existence of a contract until the formal purchase order is prepared and signed.

In *Dexter v. Ankiewicz,* 26 Cal. App. (2d) 326, 79 P. (2d) 400, it is stated, on page 333:

"This is the sole question necessary to be determined: *Does the foregoing correspondence constitute a binding contract between plaintiff and defendant?*

This question must be answered in the negative. Where the parties understand that before a contractual relationship shall exist the terms of their contract are to be reduced to writing and signed by them, a binding or completed contract does not arise until a writing evidencing the terms of their agreement has been executed by the respective parties. (*Mercantile Trust Co. v. Sunset etc. Co.,* 176 Cal. 461, 469 [168 Pac. 1037]; *Spinney v. Downing,* 108 Cal. 666, 668 [41 Pac. 797].)

In the instant case it is clear from the portions which we have italicized of the correspondence set forth above that both plaintiff and defendant contemplated that acceptance by defendant of plaintiff's offer should be signified by defendant's signing and returning the contract which accompanied plaintiff's letter to defendant dated November 23, 1935.

Therefore, applying the above-mentioned rule of law to these facts, it is evident that defendant did not accept plaintiff's offer in the manner contemplated by the parties, and hence defendant never entered into a binding or subsisting obligation with plaintiff."

In *Spinney v. Downing,* 108 Cal. 666, 41 P. 797, the Court said, at page 668:

"We think it clear that the alleged contract counted upon by defendant Downing in his cross-complaint never became a completed contract. It

appears without conflict that it was the understanding and agreement between the plaintiff and Downing that the proposed contract should be reduced to writing, and signed by both parties. This fact is made very clear by the evidence. The paper as drawn up was signed by Downing, but for some reason which does not appear never was signed by the plaintiff Spinney. It therefore never became a binding or subsisting obligation upon either. It is a general rule to which this case presents no exception that, when it is a part of the understanding between the parties that the terms of their contract are to be reduced to writing and signed by the parties, the assent to its terms must be evidenced in the manner agreed upon or it does not become a binding or completed contract. This is essentially true when, as here, the proposed contract contains reciprocal stipulations and covenants upon the part of each as a consideration for the acts of the other."

In *Toms v. Hellman,* 115 Cal. App. 74, 1 P. (2d) 31 it is stated at page 83:

"For another reason, the acceptance of the offer failed to make a contract, because the offer by its terms clearly contemplated that the complete contract should be embodied in a written contract to be subsequently executed. The word 'subscribe' in the phrase 'the signers * * * are willing to cause the company to subscribe to the following procedure' clearly implies a subsequent written contract. The sentence: 'We are willing to say that the committee as tentatively selected is agreeable to us in working out the necessary arrangements to carry the plan through'—shows that the letter was merely a tentative basis for

> negotiation, which was to culminate in a final written agreement. That the bondholders so understood it, is proven by the following statement in their acceptance: 'It is understood that upon receipt by you of written expressions of approval from the holders of 75% in face value of outstanding bonds of the above company that the June 1st, 1926, coupons will be paid and *the necessary steps will then be taken to effectuate this plan.*' (Italics ours.)"

It is defendant's contention that the record shows without substantial conflict that this case is within the rule of the authorities last discussed, and that upon this ground alone, the judgment should be reversed.

4. There was no absolute, unequivocal acceptance of any offer.

Even assuming, for the sake of argument only, that the terms of the proposed agreement between the parties were all clear and that a meeting of the minds had been had with respect to them, and that it was not the intention of the parties to contract only by purchase order, nevertheless there was no agreement created because defendant at no time made any absolute or unequivocal acceptance of any offer.

The law is clear with regard to the type of assent necessary to constitute an acceptance of an offer. An acceptance, to create a contract, must be clear, absolute and unequivocal. This requirement is separate and distinct from, and independent of, the proposition that an acceptance must be unqualified and unconditional. In other words, an indication of as-

sent which is unconditional and unqualified may nevertheless be inadequate as an acceptance of an offer because it is equivocal.

In *Williston on Contracts* (Rev. Ed.), pages 207 to 209, it is stated:

> "An acceptance must be positive and unambiguous. This requirement is often treated as identical with the requirement dealt with in the following sections that an acceptance must not change, add to, or qualify the terms of the offer; and such changes or qualifications undoubtedly prevent an acceptance from being positive and unequivocal. But even though no change in the offer is suggested in the reply of the offeree, it nevertheless may not so clearly indicate assent to the offer as to create a contract. Thus a reply to an offer to lease premises in the following terms was held *not* to make a binding contract: 'I have decided on taking No. 22 Belgrade Road, and have spoken to my agent Mr. C., who will arrange matters with you.' The same is true of a telegram to a bidder for public work, 'You are low bidder. Come on morning train;' also of the following reply to an offer to sell coal 'telegram received. You can consider the coal sold. Will be in Cleveland and arrange particulars next week.' Likewise a reply to an offer to sell land, 'Have twice attempted the tender of the first payment of $500 upon the agreement made between us on the 7th of December last. I will meet you, etc., when I shall be ready to make tender of the money and execute the proper agreements thereupon,' is insufficient. An acknowledgment of an order which stated that

> the order will receive best attention, or prompt attention, has also been held not an acceptance, since it implies no promise to comply with the terms of the order. * * *"

Section 1585, California Civil Code, provides in part:

> "An acceptance must be absolute * * *"

In *Four Oil Co. v. United Oil Producers,* 145 Cal. 623, 79 P. 366, referred to above, the Court said on this point (p. 624):

> "An acceptance must be absolute and unqualified."

See also:

Las Palmas etc., Distillery v. Garrett & Co., 167 Cal. 397, 139 P. 1077;

Patterson v. Clifford F. Reid, Inc., 132 Cal. App. 454, 23 P. (2d) 35;

Restatement of the Law, Contracts § 58;

17 *Corp. Jur.* § 381.

In the light of the foregoing, the postscript to Donnelly's letter of May 23, 1946, falls far short of constituting an acceptance. The postscript is expressly equivocal and conditional. It reads:

> "Since dictating the above, we wish to acknowledge and accept the offer of Cia. Engraw Comercial & Industrial S. A., of 1135 tons with a shipping schedule as follows: June—50 tons; July—60; Aug.-Sept.—200; September—150; October—275; November—200; December—200. *The conditions of acceptance of this quantity are the*

same as those outlined for the 600 tons. The offer of 600 tons is considered superseded by the foregoing."

The "conditions" referred to were set forth above in the main body of the letter quoted from. They included the following: (1) a purchase order to be sent to plaintiff; (2) the use of a particular, specified carrier; (3) a letter of credit to expire on October 30, 1946, or as confirmed, instead of the expiration date of December 31, 1946, as asked for by Whipple.

No reference whatever is made to the fact that plaintiff demanded "confirmed credit" "by Saturday" without which 600 tons were voided, or to plaintiff's demand for "immediate" advice as to credit for the balance. And it is important to bear in mind that plaintiff did not know of any of these conditions or the failure to agree upon the credit stipulation.

Therefore, assuming that there has been a meeting of the minds, Donnelly's letter of May 23, 1946, is not legally sufficient to constitute an acceptance. Indeed, the letter of May 23 transcends the rule relating to the necessity for an unequivocal acceptance; it is *expressly* qualified and conditional.

Actually, the letter of May 23 was merely another step in the course of negotiations leading up to a purchase order. But even giving it greater significance, it falls far short of being an acceptance. When a contract is sought to be created by a series of let-

ters, the letter of acceptance must rigidly and completely conform to the letter of offer. We have shown above, in connection with our argument on other points, that not only did Donnelly's letter vary some of the terms of the offers made through Whipple (e.g., the expiration date of the letter of credit) but it also added new conditions (the requirement that shipment be made via McCormick Steamship, and, if plaintiff denies that it contemplated a purchase order, the issuance of such a purchase order). Further plaintiff's cable of May 23 required two acts, in addition to a promise, namely: (1) "confirmed credit" "by Saturday" for 600 tons, and (2) "immediate" advice as to credit for the balance. Neither of these acts was done.

In this connection, one further point is noteworthy. When plaintiff purchased the 1135 tons, and sent its cable of May 23, it thought that it was *accepting* an offer made in Whipple's cable of May 21, wherein Whipple "accepted" 600 tons and the "balance as available." Admittedly, defendant had made no offer as of May 21. Therefore, the only offer which plaintiff could have accepted by its cable and purchase of 1135 tons was one made by Whipple for and on his own account. In any event, Schenley was not at that time bound by any contract.

Plaintiff thought, therefore, that it was accepting an offer to buy any amount of glucose up to 1300 tons. It now says that by virtue of this intended "acceptance" of one contemplated contract, a later

communication from defendant converted plaintiff's purported "acceptance" of one contract into an "offer" to make a *different* contract.

Since different contracts are contemplated by the two communications (plaintiff's of May 23 and defendant's letter dated May 23), defendant's letter could not be an acceptance.

B. WHIPPLE WAS NOT PLAINTIFF'S AGENT.

The confusion in the correspondence placed in evidence can be resolved, we submit, in but one manner: by recognition of the fact that Whipple was acting not as agent of plaintiff, but independently, for and on his own account as principal. It is defendant's position that the evidence supports no other conclusion.

Whipple testified that he has been self-employed as an export-import broker for many years.[82] He had not completed any dealings with plaintiff before this matter arose.[83]

On April 3, 1946, plaintiff wrote Whipple regarding availablity of glucose. The letter states in part:[84]

> "Our commission will be only 1%. Accordingly, we hope that you will be in a position to reserve for us from your commission an equitable part for it is only fair that if *your consumer* can obtain a lower price *you can obtain* a higher com-

---

[82]Tr., p. 105.
[83]Tr., p. 365.
[84]Tr., pp. 199-200; Pltf's. Exh. 18.

> mission. We shall await further word from you on this matter."

We have already referred, in our discussion with respect to "meeting of the minds," to the misrepresentations made to plaintiff by Whipple. These are misrepresentations *only* if Whipple *were* an agent. For example, his cable of May 20[85] which purported to "confirm" a sale of 1300 tons of glucose was perfectly proper if Whipple was binding himself. If, however, he were reporting to plaintiff as an agent, he made a gross misrepresentation, for there is no evidence whatever, and no contention made by plaintiff here, that defendant made *any* offer, or accepted any offer, at or prior to the date of that cable. The same is true as to Whipple's representation that he had a letter "committing" defendant to purchase up to 1300 tons,[86] and as to accepting 600 tons and "balance as available."[87]

Plaintiff's answer to Whipple's cable is clearly the answer of one person dealing with another at arm's length. It states:[88]

> "You cannot delay twelve days and expect same price market fluctuating seriously immediate answer required *if interested* at one twenty eight * * *"

Plaintiff at no time expressed any interest in the identity of Whipple's contemplated purchaser. As

---

[85]Deft's. Exh. A, quoted in full above at p. 7.
[86]Tr., p. 166; Deft's. Exh. F.
[87]Deft's. Ex. C, quoted in full above at p. 12.
[88]Pltf's. Exh. 20, quoted in full above at pp. 7-8.

a matter of fact, Whipple told them only when it was necessary to establish financial responsibility to avoid a 25% deposit. Berger, in an inter-office communication dated August 2, 1946, stated:[89]

> "Under the circumstances and knowing that Schenley was the purchaser, we took the steps necessary to obtain as much of the balance at the same price as possible. * * * and the suppliers now knowing Schenley as the purchaser dropped the requirement for a cash deposit requiring only the normal opening of the letter of credit."

Upon receipt of Whipple's first cable, which purported to accept 1300 tons, plaintiff, as late as *August 2, 1946,* wrote that it considered Whipple to have been acting for the *purchaser.* Mr. Berger, plaintiff's president, wrote:[90]

> "After numerous cables during April and May covering the subject of the sale of glucose thru Mr. Whipple in Los Angeles, we finally received a telegram under date of May 20th *accepting for parties then unknown to us,* an offer for 1300 tons which we had made on April 24th and May 9th."

Certainly, if Whipple were acting as plaintiff's agent (which plaintiff claims) he could not have "accepted" for defendant, the purchaser.

The next fact is that Whipple made his agreement with plaintiff for the sale of the glucose at *1.30* pesos per kilo. Then, *without advising plaintiff,* he nego-

---

[89]Tr., p. 301; Pltf's. Exh. 33.
[90]Tr., p. 300; Pltf's. Exh. 33.

tiated with defendant for the sale at 1.375 pesos per kilo. The only conclusion possible from this is that Whipple was acting independently, and for his own account as principal. It is not permissible for an agent to make an undisclosed profit on his principal's transaction. It is to be noted also that at no time did plaintiff object to this on the ground that Whipple acted in excess of his right. Plaintiff did, however, complain that it was "unfair" that Whipple should make a greater profit on the transaction being negotiated than did plaintiff.

Whipple actually bargained with defendant individually, and on terms different than those stated by plaintiff. For example, in his offer to defendant contained in the letter dated May 21st (plaintiff's Exh. 3) he purported to quote plaintiff's cable of May 21 but, in addition to raising the price, he eliminated the words, "subject to prior sale." Again, the alleged letter of acceptance (Pltf's. Exh. 5) contains conditions. *Whipple never advised plaintiff* of the conditions contained in that letter until after defendant terminated negotiations.[91] When Whipple realized that if a sale materialized his whole price of 1.375 pesos per kilo would be paid directly to plaintiff he cabled plaintiff on May 23 as follows:[92]

> "Schenley credit includes our overage you instruct collecting bank remit us from proceeds please cable confirmation this arrangement what results trucks."

---

[91]Tr., p. 190.
[92]Tr., pp. 167-168; Deft's. Exh. G.

Upon receipt of this cable, *plaintiff learned for the first time* the "price" of the glucose in the "contract" that it here alleges had already been made between *it* and defendant. Although Whipple raised the price to defendant from 1.30 to 1.375, he "accepted" plaintiff's offer at 1.30. The conclusion is inescapable: he accepted for his own account.

Whipple also wrote plaintiff on the same day:[93]

> "*We* have sold this glucose to them at Pesos 1.375 per kg. FOB Buenos Aires to include *our overage* of .075 pesos per kg. which *we* have asked you to confirm tonight with the understanding that payment will be remitted from the collecting bank here."

This letter clearly shows that Whipple conducted the negotiations as principal.

Plaintiff's reply casts further light on the relations between it and Whipple.[94]

> "Then, I think we should also have an understanding as between yourselves and ourselves with regard to the commissions or overcharges involved. Actually, on this particular contract, for the balance of 1946, we have had to make our purchases F. A. S. and after paying the necessary charges, including custom brokers, etc. we will net about 0.5 centavos per kilo but with that, we also have the risk of having to pick up deliveries of glucose if the coordination and the arrival of a steamer should not coincide and this

---

[93]Tr., p. 166; Deft's. Exh. F.
[94]Tr., pp. 202-207; Pltf's. Exh. 19.

may well cut into our profit margin if we should have any bad luck from a steamer point of view.

"I don't know what costs you have on your 7½ centavos per kilo but I believe that we should coordinate our efforts first, in order that there may be a proper division of the commissions or overages available and second, that we may know, in determining the price we can afford to pay, and also in determining the price at which the glucose should be offered.

"We certainly want to be fair to you but we believe you also desire to be fair to us and if we are to arrange a program of this sort to carry on in the future, regardless of the price of glucose, it should be with a complete understanding of the manner in which your and our interests will be compensated.

* * * * * * *

"I cannot help but regret that you did not accept our earlier suggestion on glucose which was along similar lines i.e., that you give us a range and quantities desired and let us take the steps necessary to cover.

"Such a condition makes it definitely imperative that we arrange our respective programs with 'all the cards on the table' so that we will both know the manner in which we must deal with the entire program in order that both our organizations may deal with it with continuing success.

"With kindest regards and looking forward to hear from you at a very early date, I am, * * *"

If Whipple were plaintiff's agent, plaintiff would *instruct* him as to the price of the goods. It would

control and direct Whipple's activities within the scope of his agency.

The above correspondence establishes the significant fact that plaintiff had no responsibility for the payment to Whipple of his "overage," and that it had no obligation to compensate Whipple at all. In a communication to defendant dated July 8, 1946, in stating costs to it of cancellation of its commitments, plaintiff stated:[95]

> "* * * these calculations don't cover Whipl will you deal with him directly."

Mr. Berger testified:[96]

> "Q. Yes. Now did you know on the 21st of May when you received this cable from Mr. Whipple—rather on the 22nd day of May, I see that is the date, whether he had a contract for the purchase of that or not, by Schenley?
>
> A. Did we know whether he had a *private* contract?
>
> Q. Yes.
>
> A. One would assume that from that telegram."

Whipple's own testimony on the point of agency is the following:[97]

> "Q. Calling your attention, Mr. Whipple, to the third from the last paragraph and reading from the letter—fourth from the last paragraph:

---

[95]Tr., p. 289; Pltf's. Exh. 31.
[96]Tr., p. 363.
[97]Tr., pp. 195-196.

'As you can see, our position—yours and ours —is that of only intermediaries and only as such can we reach to a conclusion.

'Our commission will be only 1%. Accordingly, we hope that you will be in a position to reserve for us from your commission an equitable part for it is only fair that if your consumer can obtain a lower price you can ask a higher commission. We shall await further word from you as to this matter.'

Does that refresh your recollection to any degree regarding the arrangement that you had concerning this difference between 1.30 and 1.375 which you quoted?

A. Yes. We had discussed in previous correspondence two or three alternative methods of handling this business, one which I had urged upon them was that I should act strictly as their representative and that any overage which was established here could be participated in on a basis to be agreed upon between us. Another, that I should act as a buying agent for the domestic user, collecting a buying commission from the user here.

There had been no definite commitment at the time that this transaction was negotiated which of those methods would be used. The original understanding from this letter which you have just shown me was that they would quote for the account of the supplier down there. Subsequently their cable, cabled instructions, was that the letter of credit should be opened in their name. I therefore assumed that they had adopted and accepted the second method which I had suggested of working directly for them, rather than for some-

one else down there whom I did not know and was not in a position to judge whether I could trust or not.

Q. Did you ever receive confirmation of their acceptance of the second method in writing?

A. No."

Plaintiff's attorney then asked Whipple to read again plaintiff's letter to Whipple dated June 3, 1946.[98] Upon doing so, Whipple said:[99]

"A. Mr. Stanton, in view of this letter I would like to change my previous testimony.

By Mr. E. B. Stanton. Q. Has that letter refreshed your recollection in any regard?

A. This letter refreshes my recollection to the extent that they did in fact on June the 3rd confirm the arrangement as to our overage.

Q. Would you read the portion of the letter which calls that to your attention?

A. 'I note your second last paragraph with regard to your overage and we have confirmed that we will take the steps necessary to see that you receive this. Just how this can be arranged, I am not certain and of course, we are awaiting the receipt of the letter of credit so that we can know its terms and will then discuss the matter with the First National Bank of Boston here in order to determine the method whereby we can protect you for your coverage and take the steps necessary to see that you obtain it.'

Q. When they speak of 'overage' that means your commission, does it, as selling agent?

A. That is right.

---

[98]Tr., pp. 202-207, quoted above on pp. 19-21.

[99]Tr., pp. 200-201.

Mr. E. B. Stanton. I will ask that this letter be introduced as Plaintiff's next in order.

The Court. It may be received.

The Clerk. Plaintiff's Exhibit 19 in evidence."

We say that the trial court erred in failing to find on this issue, and, further, that the record demonstrates that Whipple was not plaintiff's agent; that he was acting independently and that if any contract was created during these negotiations, it was a contract between plaintiff and Whipple. Such a contract would result from Whipple's cable of May 21, 1946, wherein he accepted 600 tons and "balance as available." It cannot be denied, and it is not denied, that at that time defendant had neither offered nor accepted anything.

C. PLAINTIFF COULD NOT HAVE PERFORMED THE ALLEGED CONTRACT.

As a part of its proof, plaintiff has the burden of showing that it was ready, willing and *able* to perform the alleged contract. The law does not permit a recovery on a contract by one who could not himself have performed.

Restatement, Contracts, Secs. 280, 277, 274, 281;

3 *Williston on Contracts* (Rev. Ed.), 2346 to 2348; 2464-2465;

U. S. Trading Corp. v. Newmark Grain Co., 56 Cal. App. 176, 205 P. 29;

9 *A. L. R.* 1508, 1509;

Wilson v. Alcatraz Asphalt Co., 142 Cal. 182, 75 P. 785;

Klauber v. San Diego Street Car Co., 95 Cal. 353, 30 P. 555;

Sample v. Fresno Flume Co., 129 Cal. 222, 61 P. 1085.

The question here, then, is whether the evidence shows, without real conflict, that plaintiff could not have performed. We contend that it does.

The alleged contract called for delivery of the goods in installments during the months of June to December inclusive, 1946.

After September 1, 1946, plaintiff negotiated a settlement with his own Argentine suppliers. During these negotiations it stated to one of them in a wire:[100]

> "Conversation confirmed regarding glucose contracted with you exportation permits were not granted since May last owing to disposition of the Superior Government of the Nation preventing us from fulfilling sales in North America during four months now our clients have left their purchases without effect * * *"

This statement was made to an *Argentine supplier of glucose* who, it must be presumed, knew, or could easily ascertain, whether glucose could be exported.

Nevertheless, plaintiff's own president—Mr. Berger—testified that he could have secured permits for the exportation of glucose during the period here

---

[100]Deft's. Exh. V.

involved merely by paying the taxes.[101] *But he did not make this statement in connection with the existence or absence of government restrictions.* On the latter matter, he was silent.

Plaintiff's expert witnesses, Varella and Padilla, denied the existence of any verbal order of prohibition, but did admit that there were written orders, one in August limiting glucose exports to a total of 4,000 tons for the period July to December, 1946, and providing that the permits "will be granted after proof of the *exporters* that they themselves have delivered for the internal consumption a quantity double to that for which they seek exportation."[102] A second resolution was made in September, 1946, plaintiff's experts testified, "according to which exportation of glucose will remain submitted to previous permits which will be granted as soon as the domestic requirements are covered."[103]

Plaintiff's only other witness on this point, Juan Lang, testified:[104]

> Q. Do you know whether there was any such prohibition made in the month of May, 1946?
>
> A. No.
>
> Q. Was there any such order made later than May, 1946?
>
> A. Yes.
>
> Q. When, if you know?
>
> A. In June.

---

[101]Tr., pp. 254 to 258.
[102]Tr., p. 767.
[103]Tr., p. 767.
[104]Tr., pp. 966-967.

Q. About what time in June, do you remember?

A. It was——

Mr. Bronson. Well, I will object to the question. Excuse me a moment, sir. I will object to the question that it calls for hearsay, and I am merely following counsel's objections to the same evidence in the depositions that have already been in evidence from the South American witnesses.

Mr. L. B. Stanton. I can't hear you.

The Court. Read the question to me.

(Last part of record read by the reporter.)

The Court. All this testimony may be made the subject of a motion to strike. When all this evidence is in we can tell whether it is properly admissible or not. Overruled. Did you answer? You may answer the question.

A. 16th of June, our Government on that date proclaimed the campaign of 60 days to reduce the cost of living. In connection with this official campaign it was given a very great publicity. The export of all Argentine raw materials was prohibited for these 60 days. In connection with this the export of glucose, too, was prohibited—let me say, not the export—can I correct? The issuing of new export licenses for glucose was prohibited."

Lang also testified that this order did not affect *licenses or permits already granted.*[105] He did not say, however, that it had no effect on *applications* there-

[105] Tr., p. 969.

tofore made. Plaintiff had made *applications* for permits but did not receive any.

It is clear from plaintiff's own witnesses, therefore, that there were serious restrictions upon the exportation of glucose. Plaintiff, however, offered no proof whatever that it could have complied with the conditions of the written resolutions referred to by its own experts. Further, there is no answer plaintiff can make to the testimony of its own witness Lang who said that unless a permit had *theretofore been granted,* exports of glucose for 60 days after June 16, 1946, were prohibited.

Defendant's witnesses, three Argentine lawyers, testified that when the new Peron administration came to power in Argentina, various controls were placed on exports.

Dr. Magdalena summarized the situation with respect to glucose as follows:[106]

> "Many resolutions and dispositions have been dictated covering this subject by these departments, stating which articles could be exported, which could not, and the formalities to be observed by the exporters in all cases. These dispositions have been numerous and many of course are not concerned with glucose. In connection with the exportation of glucose, the Executive Power dictated through the Secretariat of Industry and Commerce, the following resolutions which I think are the only ones directly concerned with this product: 5109, 6926 and 7499, copies

[106]Tr., p. 930.

of 6926 and 7499 are attached by Dr. Robiola to his deposition. 5109 states that in order to obtain export permits for glucose, the exporters must previously prove that they have turned in to the Government 1% of the maize harvest prior to and including 1945, and if after this date must show that the maize to be exported has been obtained from I. A. P. I. (Instituto Argentino Promocion Intercambio.) There was also a verbal order given by Dr. Rolando Lagomarsino, Secretary of Industry and Commerce, during the first days of May 1946, prohibiting the export of glucose for a period of time during which a study would be made of the market in general, and of glucose in particular. At the same time he requested retention by the Secretariat of Industry and Commerce of export permits already granted but not yet handed over to the exporters."

Dr. Carranza testified:[107]

"On 29th. August, 1946, the Secretariat of Industry and Commerce dictated resolution 6926, which limited to Exhibit 5 4000 tons the exportable quota of glucose during the period 1st. June, 1946 to 30th June 1946. On 18th. September, 1946, the Secretariat of Industry and Commerce passed resolution 7499, in which it is stated that the Exhibit 6 export of glucose will be submitted to prior permits which will be granted only when home consumption requirements have been taken care of.

According to data which I have, the Secretariat of Industry and Commerce dictated a resolution during the first part of May, 1946, prohibiting

[107]Tr., pp. 910, 911, 920, 921.

the export of glucose. This resolution, according to my information, was in the form of a verbal order given by the Secretary of Industry and Commerce, with the object in view of making a complete study of the market conditions in general, with particular reference to glucose, ordered all the persons working under him to refuse export permits for glucose, and to withhold permits already granted but not handed over to the exporters.

* * * * * * *

I cannot cite the decision of any court on this matter, but I can affirm what I have already stated, that the Secretariat of Industry and Commerce is fully authorized by laws and decrees to regulate the exportation of products; no merchandise can be exported without permission of the Secretariat of Industry and Commerce, so whatever may be the legal aspects of the verbal order, it is a positive and concrete fact that unless permits are granted by the Secretariat of Industry and Commerce, products may not be exported.

* * * * * * *

According to this, my opinion would vary or would not vary. If permit to export glucose was made after 1st. May, 1946, my opinion would vary because this would mean that even though order had been given to the contrary, permit was granted, but the fact that glucose was exported in the period under review does not change my opinion, because permits once granted and handed over to the exporter, are valid for 180 days, so that permit authorized in November of 1945, would call for glucose to be exported in May,

1946, and a permit granted in December, 1945, would permit exportation of Glucose in June, 1946, and so on. According to information I have, Engraw did not have an export permit prior to 1st. May, 1946, so no export could be made."

Dr. Robiola testified substantially to the same effect as Drs. Magdalena and Carranza.[108]

On the basis of the above testimony, we contend that the trial court erred in holding that plaintiff sustained its burden of proving its ability to perform the alleged contract. The record fails to show that plaintiff brought itself within the restrictions testified to by its own witnesses.

V.

CONCLUSION.

Defendant respectfully submits that upon any and each of the grounds above discussed, the judgment of the trial court should be reversed with directions that judgment be entered in favor of defendant and against plaintiff.

Dated, San Francisco, California,
November 28, 1949.

Respectfully submitted,
BRONSON, BRONSON & MCKINNON,
EDGAR H. ROWE,
Attorneys for Defendant and Appellant,
Schenley Distillers Corporation.

---

[108]Tr., p. 897.